87-2270

Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS F. SLOVACEK, PETITIONER,

v.

UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTIONS PRESENTED

1. Whether the petitioner's sentence should be set aside because juvenile records admitted into evidence against him during the sentencing phase of trial were obtained in violation of the due process clause of the Fifth Amendment to the United States Constitution?

2. Whether the petitioner was denied due process of law as required by the Fifth Amendment to the United States Constitution when the Court of Military Appeals held admission of petitioner's juvenile records to be harmless error?[1]

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[1]These questions and this petition are presented to this Honorable Court pursuant to counsel's obligation to petitioner as mandated by Article 70(c)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 870(c)(1) (Supp. III 1985), and *United States* v. *Grostefon*, 12 M.J. 431 (C.M.A. 1982); *cf.*, *Jones* v. *Barnes*, 463 U.S. 745 (1983).

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In the Supreme Court of the United States

OCTOBER TERM, 1987

LOUIS F. SLOVACEK, PETITIONER,

v.

UNITED STATES, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

Louis F. Slovacek respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in his case on June 8, 1987.

OPINIONS BELOW

The decision of the United States Air Force Court of Military Review was issued on October 11, 1986. *United States* v. *Slovacek*, 21 M.J. 538 (A.F.C.M.R. 1985). That decision is reproduced in the Appendix to this Petition. The decision of the United States Court of Military Appeals is reported at 24 M.J. 140 (C.M.A. 1987), and is reproduced in the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 10 U.S.C. § 867(h) (Supp. III 1985) and 28 U.S.C. § 1259(3) (Supp. III 1985). The judgment of the Court of Military Appeals was entered on June 8, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

Rule 37(b) of the Ohio Rules of Juvenile Procedure provides:

> (B) Restriction on use of recording or transcript. No public use shall be made by any person, including a party, of any juvenile court record, including the recording of a transcript thereof of any juvenile court hearing, except in the course of an appeal or as authorized by order of the court.

Article 59(a) of the Uniform Code of Military Justice ("the Code"), 10 U.S.C. § 859(a) (1982) provides:

> (a) A finding or sentence of a court-martial may not be held incorrect on the ground of any error of law unless the error materially prejudices the substantial rights of the accused.

STATEMENT OF THE CASE

On March 6, 1985, petitioner was convicted by a general court-martial at Homestead Air Force Base, Florida, on charges of burglary, kidnapping, use of marijuana and sexual misconduct with a minor. He entered mixed pleas but was convicted on all charges and sentenced to con-

finement for life, a dishonorable discharge and other accessory penalties.

At trial, the prosecutor sought to introduce into evidence records of three juvenile adjudications pertaining to the petitioner for the offenses of abduction, use of a deadly weapon during a theft, and causing physical harm by means of a deadly weapon during a theft.[2] (Prosecution Exhibit 18, 19, 20; Appellate Exhibit III). (R. 81). The defense counsel objected to the prosecution exhibits on the basis that these records concerned "juvenile convictions." (R. 93, 94). The military judge admitted the exhibits for the purpose of sentencing (R.95), but they played no role in his deliberations with respect to the petitioner's guilt or innocence.[3] (R. 91). The prosecutor referred to the substance of these documents in his closing arguments on sentence. (R. 123, 128).

In order to obtain petitioner's juvenile records, the assistant prosecutor had signed and tendered a *subpoena duces tecum* to the clerk of the Hamilton County, Ohio, Court of Common Pleas, Juvenile Division. (Appellate Exhibit III). The clerk of that court had been unwilling to release the records to anyone other than the judge presiding over petitioner's trial, so the records were forwarded to the trial judge with an enclosed letter from the clerk of the Hamilton County Juvenile Court. (R. 96). In that letter the clerk referenced the confidentiality provisions of Ohio R. Juv. P. 37(b) and attached a photocopy of the rule. (Appellate Exhibit III). Petitioner's trial defense counsel objected to Appellate Exhibit III. (R. 95).

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[2] Petitioner was found by the Hamilton County, Ohio, Court of Common Pleas, Juvenile Division, to have violated Ohio Rev. Code §§ 2903.11, 2905.02, 2911.01, 2913.01 and 2923.11. He was adjudged a juvenile delinquent.

[3] Petitioner elected not to be tried by jury.

On appeal before the Air Force Court of Military Review, petitioner contended, *inter alia*, that the trial judge had erred by admitting the records of his juvenile adjudications. The Court of Military Review held that petitioner's juvenile records were the functional equivalent of a conviction but further determined that such records were admissible before a court-martial when considering sentencing. 21 M.J. 538, 540-541 (A.F.C.M.R. 1985). The court nevertheless reduced petitioner's sentence from confinement for life to sixty years. 21 M.J. at 541.

The Court of Military Appeals granted discretionary review of petitioner's case on the issue of whether Rule for Courts-Martial (R.C.M.) 1001(b)(3) precluded the introduction in sentencing of petitioner's juvenile records. 22 M.J. 271 (C.M.A. 1986). That court found error in the admission of this evidence because juvenile adjudications did not equate to convictions within the meaning of R.C.M. 1001(b)(3)(A). However, citing Article 59(a) of the Code, the court found the error to be harmless. 24 M.J. 140 (C.M.A. 1987).

After oral argument at the Court of Military Appeals but before the decision of that court, petitioner sought to file by motion with the court an affidavit wherein he purported to raise for the first time the issue that he was denied due process of law in the manner in which his juvenile records had been obtained. The motion was submitted pursuant to the authority of *United States* v. *Grostefon*, 12 M.J. 431 (C.M.A. 1982). The Court of Military Appeals denied petitioner's motion. 24 M.J. 331 (C.M.A. 1987).

REASONS FOR GRANTING THE WRIT

I

Constitutional concepts of due process of law have long been extended to members of the military. *United States*

v. *Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951). This case presents a novel application of traditional notions of due process because the right implicated in a criminal setting is analogous to the constitutional right of privacy.

In *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), the Supreme Court recognized a right of privacy which has since been construed to embrace the right not to disclose private information. *Cf.*, *Whalen* v. *Roe*, 429 U.S. 589, 599-600 (1977). This right can be violated by governmental collection and storage of personal data or by government release of data to the public or to other governmental agencies. *See generally*, *Comment*, *The Constitutional Right to Withhold Private Information*, 77 NW.U.L. Rev. 536, 537 (1982). Because courts are part of the government, their forced collection or release of personal data may violate the constitutional right not to disclose private information.

This Court has been sensitive to the need for due process protections in conjunction with juvenile proceedings. *In re Gault*, 387 U.S. 1 (167). So, too, has been the State of Ohio, as shown by that state's enactment of Ohio R. Juv. P. 37(b) and a statute to ensure controlled release of personal information. Ohio Rev. Code § 1347.01 *et. seq.*

In this case the petitioner claims that the express provisions of Ohio R. Juv. P. 37(b) were violated by the release of his juvenile records to the trial judge. The rule was violated because it authorizes release of such records only during the course of an appeal or as authorized by order of the court. *Cf.*, Ohio Op. Atty Gen. No. 84-077 (1984). Here, petitioner contends there was no appeal and no court order to justify the action of the Ohio Court in complying with the subpoena. Such release of records denied him the

due process of law to which he was entitled.[4] When conditions such as this prevail, the threat to constitutional standards of due process is self evident.

II

Every criminal defendant has the right to a fair trial in accordance with principles of due process guaranteed by the federal Constitution. However, the right to a fair trial does not guarantee an error free trial. *United States* v. *Hasting*, 461 U.S. 499, 508-09 (1983) (considering the "human fallibility of the participants, there can be no such thing as an error-free, perfect trial and . . . [the] Constitution does not guarantee such a trial."); *see also*, *Delaware* v. *Van Arsdall*, 106 S.Ct. 1431, 1436 (1986); *Brown* v. *United States*, 411 U.S. 223, 231-32 (1968). In recognition of this precept, military and other federal harmless error statutes have been enacted. Article 59(a), U.C.M.J.; 10 U.S.C. § 859(a) (1982); 28 U.S.C. § 2111 (1982); *see also*, Fed. R. Crim. P. 52(a). These statutes essentially preclude the reversal of convictions and sentence for small errors or defects that have little, if any, likelihood of having changed the result of trial." *Chapman* v. *California*, 386 U.S. 18, 22 (1967); *see*, *Rose* v. *Clark*, 106 S.Ct. 3101, 3106 (1986). Curiously, these rules make no distinction between constitutional errors and errors of federal laws and rules.

In *Chapman* v. *California*, *supra*, this Court shaped the law of harmless constitutional error in criminal proceedings. There, the Court rejected the argument that all federal constitutional errors, regardless of the facts and

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[4] Petitioner makes no comment with respect to whether any such violation may have been mooted by the holding of the Court of Military Appeals that admission of these records in evidence was error. 24 M.J. at 140; *see*, *Board of Liquor Commissioners* v. *Pastore*, 469 U.S. 238, 240 (1985).

circumstances, must always be deemed harmful. Reiterating the test first articulated in *Fahy* v. *Connecticut*, 375 U.S. 85 (1963), the Court stated "[t]he question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." 386 U.S. at 23. To hold a constitutional error harmless, a reviewing court "must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

Since *Chapman*, the Court has gradually broadened the use of harmless error analysis in the constitutional context. Last term, in *Delaware* v. *Van Arsdall* and *Rose* v. *Clark*, *both supra*, the Court took further steps in this direction, finding that violations of the right to cross examine a testifying witness and the right to a properly instructed jury can constitute harmless errors. In *Rose* v. *Clark*, specifically, Justice Powell, writing for the majority, declined to include an erroneous jury instruction on intent among those violations that, under *Chapman* require automatic reversal because they "necessarily render a trial fundamentally unfair." 106 S.Ct. at 3106. The Court said "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.*, at 3106-07. Thus, these opinions indicate a willingness to apply harmless error analysis to almost any constitutional violation not explicitly exempted by *Chapman* as rendering a trial fundamentally unfair.

Against this background, the petitioner contends that the Court of Military Appeals denied him due process of law and erred to his substantial prejudice by concluding that the trial court's consideration of his juvenile adjudications in the determination of the sentence he was to receive constituted harmless error. *See generally*, Com-

ment, *Harmless Error: Abettor of Courtroom Misconduct*, 74 J. Crim. L. & Criminology 457 (1983); *but see*, *Thompson* v. *Estelle*, 642 F.2d 996 (5th Cir. 1981). As described in the first part of this section, the error complained of herein is, petitioner contends, of constitutional dimensions. He contends that the improper acquisition and introduction of his juvenile records abridged his basic due process right to a fair trial.

Petitioner takes issue with the determination by the Court of Military Appeals that this evidence was cumulative with his confession. He avers that the detail of the exhibits goes beyond the generic description of events recited in his confession and directly exacerbated his sentence. Petitioner subscribes to the view adopted by Justice Blackmun in his dissent in *Rose* v. *Clark* that "[a] trial that was fundamentaly unfair at the time it took place . . . cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence." 106 S.Ct. at 3113 (Blackmun, J., dissenting). The apparent interest in the outcome determination function of the trial as expressed by the majority opinion in that case has, petitioner submits, eclipsed concern for the integrity of the process leading up to the trial outcome.

The Court of Military Appeals overlooked the prejudice inherent in the consideration of petitioner's juvenile records. Moreover, no standard of analysis was articulated in support of that court's conclusion that the error was harmless. Accordingly, the petitioner contends such a conclusion was erroneous, and this case warrants further examination by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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August 1987

APPENDIX A

UNITED STATES, Appellee,

v.

Louis F. SLOVACEK, Senior Airman,
U.S. Air Force, Appellant.

No. 54,049.
ACM 24800.

U.S. Court of Military Appeals.

June 8, 1987.

Accused, a senior airman, United States Air Force, was convicted before a general court-martial, Arnold I. Persky, J., of kidnapping, sodomy, and wrongful use of marihuana, and he appealed. The United States Air Force Court of Military Review, 21 M.J.538, Hodgson, C.J., affirmed findings and sentence except for confinement in excess of 60 years. Review was granted. The United States Court of Military Appeals, Sullivan J., held that: (1) juvenile adjudication was not "conviction" for purposes of rule authorizing introduction of evidence of military or civilian convictions of accused, and (2) erroneous admission of evidence of juvenile adjudications of accused was harmless.

Affirmed.

For appellant: *Major Deborah A. Baker* (argued); *Colonel Leo L. Sergi* and *Major William H. Lamb* (on brief).

For appellee: *Captain Mark Van Nuys* (argued); *Colonel Kenneth R. Rengert* (on brief); *Lieutenant Colonel Donal F. Hartman, Jr.; Major Thomas O. Maser*, USAFR.

SULLIVAN, Judge:

Appellant was tried by a general court-martial composed of a military judge alone March 6, 1985, at Homestead Air Force Base, Florida. Pursuant to his pleas, he was found guilty of kidnapping, sodomy, and wrongful use of marihuana, in violation of Articles 134, 125, and 112a, Uniform Code of Military

Justice, 10 U.S.C. §§ 934, 925, and 912a, respectively. Contrary to his pleas, he was found guilty of one specification of burglary, in violation of Article 129, UCMJ, 10 U.S.C. § 929. Appellant was sentended to a dishonorable discharge, confinement for life, total forfeitures, and reduction to E-1. The convening authority approved this sentence. The Court of Military Review affirmed the findings and the sentence except for confinement in excess of 60 years. 21 M.J. 538.

We granted review of the following issue:

> WHETHER R.C.M. 1001*B*(3) PRECLUDES THE INTRODUCTION IN SENTENCING OF JUVENILE RECORDS OF THE APPELLANT.

We hold that error occurred in the admission of this evidence at appellant's court-martial. Nevertheless, we find such error was harmless. Art. 59(a), UCMJ, 10 U.S.C. § 859(a); Mil.R.Evid. 103, Manual for Courts-Martial, United States, 1984.

The facts pertinent to this appeal are not in dispute. After smoking a marihuana cigarette and consuming large amounts of alcohol, appellant drove to the on-base residence of a fellow servicemember. He entered the house and abducted a 3-year-old child. He then drove to an isolated area off-base, had the child perform fellatio on him, and returned the victim to a location near her home, at which time he was apprehended.

Three days later appellant executed a sworn statement admitting his actions with the child. In that confession, appellant also gratuitously acknowledged prior acts of misconduct while he was a juvenile living in Ohio. His admission as evidenced in the record reads as follows:

> Also, when I was 17 years old, I spent a year in a Juvenile maximum security facility. I was arrested for assault. A friend of my ALAN GOINES (unsure of last name), Were out looking for girls, we saw a girl we knew from school and asked her for a ride. She gave us the ride, and ALAN ended up trying her up and telling her that we were going to force her to have sex with us. I stopped ALAN from doing anything. We were caught by the police, I went to court and was sentenced. The incident occurred in Cincin-

> nati, OH, in Nov 74. I was in 11 grade at the time. Alan was 15, and the girl, whose name I can't remember, was 17. The incident occurred at Hawthorne or Grand Street. At the time I was living on Considine Street, and ALAN lived two houses away. I don't know where he is now. I have thought about having sex with young girls age 11 and up; however, I never have. I further state that I have had no other sexual contact with [the child] or any other small children.

During sentencing, copies of records from the Hamilton County, Ohio, Court of Common Pleas, Juvenile Division, were received as three prosecution exhibits. The information contained therein indicates appellant was adjudged a delinquent for abduction, possession of a deadly weapon during a theft, and causing physical harm with a deadly weapon. The defense objected to admission of these records because "juvenile convictions" are inadmissible for sentencing purposes at a court-martial. In an earlier motion, he characterized them as "juvenile adjudications."

[1] Appellate defense counsel carries that argument forward on this appeal and maintains that juvenile records do not amount to a "conviction" within the meaning of R.C.M. 1001(b)(3)(A), Manual, *supra*, It provides:

> The trial counsel may introduce evidence of military or civilian convictions of the accused. For purposes of this rule, there is a "conviction" in a court-martial case when a sentence has been adjudged.

The Government, on the other hand, urges this Court to broadly interpret this evidentiary rule to conform sentencing practice at courts-martial to that in federal civilian courts. *See United States v. Hansen*, 701 F.2d 1078, 1082-83 (2d Cir.1983). We agree with defense counsel. Our starting point in resolving this question is the language of R.C.M. 1001(b)(3)(A). *See* Art. 36, UCMJ, 10 U.S.C. § 836. The word "conviction" is not fully defined in this rule of military procedure. However, Mil.R.Evid. 609(d), which was also promulgated by the Presi-

dent, implicitly recognizes a difference between a conviction and a juvenile adjudication.

It states:

> (d) *Juvenile adjudications.* Evidence of juvenile adjudications is generally not admissible under this rule. The military judge, however, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

Consistency in recognizing a difference between the two is appropriate. *See generally* R.C.M. 102. In addition, excessive reliance on federal civilian sentencing practice is misplaced. Sentencing is exclusively a function of a judge in federal civilian criminal courts, and a reluctance to expose lay members at courts-martial to such a broad range of sentencing information is understandable. *See generally United States v. Mack*, 9 M.J. 300, 316-19 (C.M.A. 1980); App. 21, Analysis, R.C.M. 1001, Manual, *supra*.

[2] Accordingly, we hold that a juvenile adjudication is not a conviction for purposes of R.C.M. 1001(b)(3)(A). Error occured in this case. However, this error was harmless because these prosecution exhibits were substantially cumulative of the admissions of appellant in his pretrial statement which were noted earlier. This statement had already been received in evidence on the merits of the burglary charge. In this regard R.C.M. 1001(f)(2)(A) states:

> (f) *Additional matters to be considered.* In addition to matters introduced under this rule, the court-martial may consider—
>
> * * * * * *
>
> (2) *Any evidence properly introduced on the merits before findings, including:*
>
> (A) *Evidence of other offenses or acts of misconduct even if introduced for a limited purpose.*

(Emphasis added.) Prejudice in this context is illusory since this information was already properly before the judge for sentencing purposes.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge EVERETT and Judge COX Concur.

APPENDIX B

UNITED STATES COURT OF MILITARY APPEALS

Daily Journal
Tuesday, May 27, 1986

86-163

ORDERS GRANTING PETITION FOR REVIEW

No. 54049/AF. U.S. v. Louis F. Slovacek. CMR 24800. Granted on Issue I raised by appellate defense counsel as follows:

> Whether R.C.M. 1001*b*(3) precludes the introduction in sentencing of juvenile records of the appellant.

APPENDIX C

UNITED STATES

v.

**Senior Airman Louis F. SLOVACEK,
FR 280-68-1163, United States
Air Force.**

ACM 24800.

U.S. Air Force Court of Military Review.

Sentence Adjudged 6 March 1985.

Decided 11 Oct. 1985.

Accused, a senior airman, United States Air Force, was convicted before a general court-martial, Arnold I. Persky, J., of kidnapping, sodomy with a child under 16, burglary and wrongful use of marijuana, and accused appealed. The United States Air Force Court of Military Review, Hodgson, C.J., held that erroneous admission of hearsay evidence concerning admission of hearsay evidence concerning prior sexual contact was not fatal to burglary conviction and that evidence of juvenile convictions was properly considered in sentencing.

Affirmed.

Appellate Counsel for the Accused: Colonel Leo L. Sergi and Major William H. Lamb.

Appellate Counsel for the United States: Colonel Kenneth R. Rengert, Major Robert E. Ferencik and Major Thomas G. Maser, USAFR.

Before HODGSON, FORAY, and MICHALSKI, Appellate Military Judges.

DECISION

HODGSON, Chief Judge:

During the early evening hours of 1 November 1984, the appellant smoked a marijuana cigarette at his off-base quarters near Homestead Air Force Base. Later that evening he and a friend consumed large amounts of alcoholic beverages both on and off base. While returning to his home the appellant took a short cut through Homestead Air Force Base and drove to the on-base residence of a fellow servicemember with whom he was acquainted. Upon arriving there, he entered the house and abducted their three year old daughter. He then drove to an isolated area off-base and had the child perform fellatio on him. He was arrested as he returned the victim to her home.

On the above facts and pursuant to mixed pleas,[1] the appellant was convicted in a bench trial of kidnapping, sodomy with a child under 16, burglary and wrongful use of marijuana. He was sentenced to a dishonorable discharge, total forfeitures, life imprisonment and reduction to airman basic.

I

As part of its evidence on the burglary allegation, the prosecution offered an out-of-court statement of the appellant wherein he acknowledged he went to the residence for the purpose of getting the child and "having sex" with her. Also included in the document was the statement, "I further state that I have had no other sexual contact with the child or any other small children." In his cross-examination of the interviewing officer, defense counsel sought to establish that the police investigation of the incident tended to confirm the truthfulness of the appellant's statement.

The prosecutor contended that the circumstances just described would permit him to establish, as rebuttal evidence,[2] an earlier incident by the appellant involving sexual contact with the victim. The trial judge agreed and allowed a police

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[1] The appellant pleaded guilty to the kidnapping, sodomy and drug allegations. He defended the burglary charge on the ground he was too intoxicated to form the required intent at the time he entered the dwelling. The trial judge rejected this contention.

[2] The trial judge permitted the government to offer the evidence in its case-in-chief.

investigator to testify that the *victim's mother told him that her daughter told her that* "six months prior the accused had had her perform oral sex on him."

[1,2] Assuming, *arguendo*, the Government may impeach a portion of a confession it has offered on the merits (*see* Mil.R.Evid. 607), the question remains as to the method of getting this evidence before the court. The child who allegedly participated in the act could have been called as a witness notwithstanding her tender years, *cf. United States v. Allen*, 13 M.J. 597 (A.F.C.M.R. 1982) (Trial judge properly qualified a four year old child as a witness), but the record is silent as to why this was not done. The statement of the police investigator is a clear example of multiple hearsay, but hearsay within hearsay is not excluded if an exception to the hearsay rule satisfies each hearsay problem associated with the statement. *See* Mil.R.Evid. 802 and 805. While not stated at trial by either the prosecutor or the trial judge, it appears to us that the residual hearsay exception of Mil.R.Evid. 804 is the only basis for admitting the child's statement.

We have repeatedly held that statements admitted under the residual hearsay exception are admissible only where the express requirements of the rule are met. *United States v. Barror*, 20 M.J. 501 (A.F.C.M.R. 1985). Here the Government failed to establish: 1) that the child was unavailable as witness, *see United States v. Griffin*, 21 M.J. 501 (A.F.C.M.R. 1985); 2) that the child's statement possessed "circumstantial guarantees of trustworthiness" as to its truthfulness, *United States v. Barror, supra;* and 3) that the defense was notified in advance of trial that the child's statement would be used, Mil.R.Evid. 804(b)(5); *see also United States v. Ruffin*, 12 M.J. 952 (A.F.C.M.R. 1982). Under these circumstances we hold that the trial judge abused his discretion in admitting the child's statement. *Accord United States v. Crayton*, 17 M.J. 932 (A.F.C.M.R. 1984).

[3-7] Having concluded the trial judge erred, we must now assess the effect of this testimony on the appellant's burglary conviction. Not every error in admission of evidence requires the reversal of a conviction. Harmless error results where it is

not reasonably probable that the fact finders were swayed by the invalid evidence. *United States v. Clark*, 12 M.J. 978 (A.F.C.M.R. 1982). The appellant contends he was too drunk to form the specific intent alleged to exist at the time of the breaking and entering. In his pre-trial statement he acknowledged he entered the house with the purpose of "having sex" with the child. True, at trial he sought to negate this admission, but his is a factual dispute that the trial judge resolved against him. Further, the appellant's intent at the time of this entry may be established by circumstantial evidence and may be inferred from the time and manner of the entry and his conduct after entry. Here, the appellant abducted the child and took her to an isolated area where the offense occurred. In our view, there is compelling evidence to support the appellant's conviction for burglary, and the rebuttal evidence as to alleged prior misconduct with the victim did not contribute to that conviction. *United States v. Garcia*, 15 M.J. 685 (A.F.C.M.R. 1983).

II

[8, 9] The appellant next argues that the trial judge erred in admitting, over objection, during sentencing, evidence of three "juvenile convictions," i.e., abduction, use of a deadly weapon during a theft and causing physical harm by means of a deadly weapon during a theft. These offenses apparently resulted from a single episode when the appellant was seventeen. He was subsequently adjudged a delinquent by the Hamilton County, Ohio Court of Common Pleas, Juvenile Division.

Appellate defense counsel maintain these juvinile records do not amount to a conviction within the meaning of R.C.M. 1001*b*(3)(A)[3], and are essentially "civil" in nature and not criminal. We note in passing that the Court directed that the appellant remain under the care and control of the "YOUTH COMMISSION STATE OF OHIO, MAXIMUM SECURITY

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[3] R.C.M. 1001*b*(3)(A) states in part:

(3) *Evidence of Prior Convictions of the Accused.*

(A) In General. The trial counsel may introduce evidence of military or civilian convictions of the accused . . .

FACILITY" until age 21 or, if sooner, released under due process of law.

A significant number of jurisdictions permit evidence of prior juvenile adjudications to be considered by the sentencing authority in assessing punishment[4]. This is true in Ohio where the Ohio Revised Code, 2151.35 states in part:

> The disposition of a child under the judgment rendered or any evidence given in the [juvenile] court shall not be admissible against the child in any case or proceeding in any other court, except that the judgment rendered and *the disposition of such child may be considered by any court only as to the matter of sentence* or to the granting of probation, (*emphasis added.*)

At best, sentencing is a deliberative, thoughtful process and not a science. It follows therefore that the sentencing authority should be given as much relevant information as is available and admissible to guide him or her in the sentencing task.

The appellant's juvenile records are the functional equivalent of a conviction, and since the Manual for Courts-Martial does not expressly prohibit the consideration of juvenile adjudications, and the Ohio statute expressly permits it, we see no reason in law or logic to bar their admission. We find support for this conclusion in *United States v. Barrow*, 9 U.S.C.M.A. 342, 26 C.M.R. 123 (1958) and *United States v. Morris*, 9 U.S.C.M.A. 347, 26 C.M.R. 127 (1958), where the Court of Military Appeals held it permissible for the reviewing authority to consider the accused's juvenile misdeeds and convictions when considering clemency. Surely, the sentencing authority should be allowed the same prerogative when arriv-

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[4] *United States v. Hansen*, 701 F.2d 1078 (2d Cir. 1983); *United States v. Battle*, 523 F.Supp. 855 (S.D. Ohio, W.D. 1981); *Hayden v. State*, 283 S.C. 121, 322 S.E.2d 14 (1984); *Commonwealth v. Smith*, 333 Pa.Super. 179, 481 A.2d 1365 (1984); *People v. Hubbell*, 1080 Cal.App.3d 253, 166 Cal.Rptr. 466 (1980); *Dickens v. State*, 368 So.2d 950 (Fla.App, 1979); *In Interest of Mareno*, 43 Ill.App.3d 556, 2 Ill.Dec. 425, 357 N.E.2d 592 (1976); *State v. Koehmstedt*, 297 N.W.2d 315 (N.D.1980); *State v. Hernandez*, 20 Wash.App. 225, 581 P.2d 157 (1978).

ing at a sentence. The appellant's juvenile records were properly admitted.

III

In light of the error discussed in Part I of this opinion, the record of trial and the appellant's prior disciplinary history, we find appropriate only so much of the sentence as provides for a dishonorable discharge, confinement for 60 years, total forfeitures and reduction to airman basic. The findings of guilty and the sentence, as modified, are

AFFIRMED.

FORAY, Senior Judge and MICHALSKI, Judge, concur.

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